thus *reasonably contemplates* the inevitable consequences of an employee's temporary reassignment to cover for another employee on FMLA leave. Therefore, one cannot justifiably contend that the regulation at issue is arbitrary, capricious or manifestly contrary to the FMLA when considered in conjunction with the stated purpose of the small operations exemption.[9] Accordingly, the Fifth Circuit correctly concluded that the regulation is at least a *permissible* interpretation of the statute, a regulation which is entitled to deference.

The more general purpose of the exemption is to relieve small employers from the burdens imposed by the FMLA. Congress explains:

> [The Act] covers only employers with fifty or more employees. The exemption of employers with less than fifty employees means that 95% of all employers are excluded from the coverage of the bill. . . . While concerned about the low coverage figures, the Committee, *in recognition of the particular problems faced by small employers*, approved this provision which exempts the small employer while providing coverage for workers employed by medium and large sized companies.

House Report No. 102-135(I), June 27, 1991, page 37 (emphasis added). *See also* House Report No. 101-28(I),

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[9] The Petitioner's only arguments for striking this regulation are (1) the term "radius" can be found in Senate and House reports; and (2) the term "radius" can be found in numerous court opinions. However, the term "radius" is not located in the Act itself, and all courts that have used the term "radius" when citing the statute have done so colloquially or in mere dicta. None of the cited opinions analyzed the proper method of measuring "miles" or actually applied a 75-mile "radius" under the FMLA exemptions.

April 13, 1989, page 24. Congress clearly contemplated and accepted the scope of the exemption granted to employers such as PCE who employ less than 50 employees within 75 miles. Congress firmly delineated the exemption at 50 employees, thereby declaring that any employer with less than 50 employees within 75 miles of the worksite shall not be burdened by the requirements of the FMLA. PCE did not employ 50 employees within 75 miles of Mr. Bellum's worksite. Thus, PCE exemplifies the small operation that Congress specifically intended to exclude from the burdens of the FMLA.

III. The Fifth Circuit Opinion is Reasonable and Does Not Fail to Apply Existing Law

Petitioner contends that *Ragsdale*, see supra note 5, requires agencies to "respect the compromises made by Congress," and that Congress compromised on the number of employees required for and the geographic limitation on the small employer exemption. While this may be true, neither party contends that the number of employees (50) or the number of miles in the exemption (75) should be or has been modified. The only issue at this juncture is the definition of the term "miles." Petitioner contends that "Congress clearly chose 'radius' as the method to measure distance within 75 miles," but, to the contrary, Congress clearly *eliminated* all references to a 75-mile "radius" for purposes of the small operations exemption. Obviously, Congress did not want to delimit the geographical distance with that qualifier. The Fifth Circuit properly conducted a *Chevron* analysis which primarily focused on the stated purpose of the small operations exemption. This reasoning is not flawed.

In addition, the Petitioner argues that the regulation lacks the "uniformity and simplicity" of Federal Rule of Civil Procedure 4, which uses a "radius" method to measure distance. However, the purpose of the small operations exemption is not merely "uniformity and simplicity"; the specific purpose of this exemption, separate and apart from all others, is to alleviate the difficulties faced by employers when reassigning employees to geographically distinct facilities. Therefore, the Petitioner's reliance on Rule 4 is unfounded.

Lastly, Petitioner contends that the Fifth Circuit failed to apply existing law. Though Petitioner cites twenty-six cases in which the term "radius" can be found, see supra note 4, Petitioner simultaneously acknowledges that no court has determined this issue. Those references to "radius" are nothing more than dicta. The Fifth Circuit clearly did not fail to apply existing law, for there is no existing law to be applied.

IV. The Issue Presented on Appeal Does Not Constitute an Issue of National Importance

There exists no Circuit split on this particular issue, and there is no emerging minority view to create a Circuit split. The Fifth Circuit is the only Circuit that has opined on the definition of "miles" in 29 U.S.C. § 2611(2)(B)(ii) and on the validity of 29 C.F.R. § 825.111(b). If Congress deems the Fifth Circuit opinion an unwarranted interpretation of the statute or the regulation, it can easily amend the statute to express its intended method of measuring miles. This response is unlikely however, considering that the regulation defining "miles" as surface miles has existed since 1995 without further comment or

action from Congress. Since remedies short of judicial review are available to settle a Circuit split should one arise, it is not necessary to grant a Writ of Certiorari.

CONCLUSION

The FMLA is silent as the proper method of measuring "miles" as stated in the Act's small operations exemption, and historical references to a 75-mile "radius" lost all significance when Congress deleted the term from the final version of the Act. The accompanying regulation that defines "miles" as "surface miles, using surface transportation" directly parallels the stated purpose of the FMLA's small operations exemption – namely, to reassign employees to geographically separate facilities while another employee takes FMLA leave. Therefore, the regulation is not arbitrary, capricious or manifestly contrary to the statute. Accordingly, the Fifth Circuit's decision upholding the regulation as a permissible interpretation of the statute should be affirmed, particularly since no other district court or court of appeals has rendered a contrary decision. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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